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Supreme Court, U.S.
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No. 97-691

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

MICHAEL F. b/n/f MR. AND MRS. BARRY F.

Petitioners,

vs.

CYPRESS-FAIRBANKS INDEPENDENT SCHOOL DISTRICT

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Was judgment properly granted against the Petitioners on their claims under the Individuals with Disabilities Education Act where the Fifth Circuit, applying well settled law, determined that the Respondent had provided the Petitioner Michael F. a free, appropriate public education prior to the time the Petitioners unilaterally removed him to an out-of-state residential treatment center?

2. When a school district prevails in a case brought under the IDEA, is an award of costs to the school district proper pursuant to Federal Rule of Civil Procedure 54?

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Cypress-Fairbanks Independent School District, respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the Fifth Circuit Court of Appeals' decision in this case. The decision of the Fifth Circuit is reported at 118 F.3d 245 (5th Cir. 1997). The decision of the District Court is reported at 931 F.Supp. 474 (S.D. Tex. 1996).

SUMMARY

The Petition should be denied. This case concerns the Individuals with Disabilities Education Act (IDEA) and a disabled student's attempt to obtain reimbursement for costs associated with the student's parents' unilateral decision to place the student in a residential treatment facility. It involves the application of well-settled rules of law to a particular set of facts. In an attempt to elevate this case into one worthy of review, Petitioners have disregarded large portions of the record and have ignored case law concerning the IDEA, as well as Rule 54 of the Federal Rules of Civil Procedure. This case ultimately turns on the specific facts reviewed by the Fifth Circuit Court of Appeals and the application of the requirements of the IDEA and the Federal Rules of Civil Procedure to those facts, not on important issues of federal law. Petitioners merely are asking the Court to provide yet another level of appellate review of the facts to the district court's determination that Petitioners were not entitled to reimbursement of costs of treatment at a private residential facility.

Contrary to the Petition, the voluminous record in this case shows that the program offered to the student by the school district at the time of his removal to a private residential treatment facility was individualized on the basis of his assessment and performance, administered in the least restrictive environment, provided in a coordinated and collaborative manner, and resulted in positive academic and non-academic benefits. Accordingly, the Fifth Circuit Court of Appeals properly recognized that the student was provided a free appropriate public education in accordance with the IDEA. The Petitioners' claim that the courts below applied an improper standard of review is simply incorrect.

Finally, the Petitioners' claim that an award of costs to a prevailing school district under Federal Rule of Civil Procedure 54 violates the IDEA is not supported by the plain language of the IDEA or its legislative history.

In short, the Petitioners merely disagree with the specific application of the law to their own unique set of facts. The Petitioners offer no compelling basis for review of the decision below.

STATEMENT OF THE CASE

Proceedings Below

This action was brought on August 25, 1994 in the Southern District of Texas, Houston Division, by the Cypress-Fairbanks Independent School District (Cy-Fair ISD) as an appeal of the Texas Education Agency hearing officer's decision, *Michael F. b/n/f Mr. & Mrs. Barry F. vs. Cypress-Fairbanks Independent School District*, Docket No. 070-SE-1193. The appeal to the district court was brought pursuant to the Individuals With Disabilities Education Act, specifically 20 U.S.C. § 1415.[1] The Cy-Fair ISD appealed the hearing officer's decision which ordered the reimbursement of costs associated with the Petitioners' unilateral decision to place their son, Michael, in a Utah psychiatric treatment facility, Provo Canyon School ("PCS").

The state administrative hearing officer held that Michael received a free appropriate public education ("FAPE")

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[1]The IDEA was amended, effective June 4, 1997. Because all facts and decisions in this case occurred before the statute was amended, the IDEA prior to the 1997 amendments is applicable to this case. All citations to the IDEA are prior to the 1997 amendments.

during the 1992-1993 school year and that Cy-Fair ISD complied with the procedural requirements under the IDEA during the entire relevant period. (*See* Decision of the Hearing Officer, Texas Education Agency Record ("TEA record"), Vol. I at 36, 44). The hearing officer, however, held that the individual education plans ("IEP's") developed for Michael on May 26, 1993 and October 4, 1993 were inappropriate because they failed to provide him with educational benefit. *Id.* at 38, 43. The hearing officer concluded that Michael's placement at PCS was proper and ordered Cy-Fair ISD to reimburse Michael's parents $15,978.20 for the PCS placement.

Cy-Fair ISD appealed the hearing officer's decision and challenged, *inter alia*, whether the hearing officer's decision to require reimbursement was correct. This issue was to be resolved by determining whether Michael's IEP's developed on October 4, 1993 and November 18, 1993 were reasonably calculated to confer educational benefit on Michael. Michael's parents did not seek additional findings of fact or conclusions of law or appeal any portion of the hearing officer's decision.

The district court received additional evidence at a hearing held on September 5, 1995. (R. 733-737, 921). Following this hearing and an extensive review of the administrative record, the district court rendered judgment for Cy-Fair ISD on December 13, 1995. (R. 801).[2] The district court ruled that the IEP's in effect when Michael resided in the

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[2]The record developed in this case consists of the docket entries developed in the district court proceeding, ten volumes of transcript and exhibits entered at the administrative hearing before the Texas Education Agency hearing officer, the transcript of the proceedings from the district court hearing held on September 5, 1995, as well as the exhibits entered at the hearing.

residential treatment facility were in compliance with the IDEA. The lower court's order reversed the hearing officer's decision that the IEP's were inappropriate and that Michael was entitled to reimbursement. The district court also ordered that Cy-Fair ISD recover its costs of court, other than attorneys' fees, from the Petitioners pursuant to FED. R. CIV. P. 54, and specifically awarded costs in the amount of $6,770.05 on February 15, 1996. Petitioners filed a motion for new trial, which was denied (R. 808, 907).

Petitioners filed a notice of appeal on March 11, 1996. The Fifth Circuit heard oral argument on May 2, 1997 and rendered a written opinion on July 15, 1997, affirming the district court's decision in all respects regarding the school district's provision of a free appropriate public education but modifying the award of costs, reducing them to $3,837.40. Petitioners filed a petition for writ of certiorari on October 14, 1997.

Statement of Facts

The Petition omits and misstates many important facts that are essential to understanding why Michael F. was provided a free appropriate public education by Cy-Fair ISD and why this case is not worthy of review by the Court. Accordingly, the Respondents provide their own statement of the material facts as follows:

Michael's family moved into the boundaries of Cy-Fair ISD in the summer of 1992. Michael enrolled as a sixth grader at Cy-Fair ISD's Hamilton Intermediate School ("Hamilton IS") for the 1992-1993 school year. At various times, Michael has been diagnosed with bi-polar disorder, severe depression, attention deficit hyperactivity disorder, and, most recently, Tourette's Syndrome. Michael's disorder is characterized by four features, namely (1) hyperactivity and decreased attention,

(2) obsessive compulsive behavior, (3) rapid mood swings, and (4) tics and twitches. In the fall of 1992, he was identified as "other health impaired" for purposes of receiving educational services under the IDEA. (TEA record, Vol. IX, Respondent's Exhibit 2).

For the 1993-1994 school year, Michael initially enrolled at Cy-Fair ISD's Bleyl Junior High School ("Bleyl JHS"). (TEA record, Vol. IX, Respondent's Exhibit 9). On November 4, 1993, Michael's parents unilaterally withdrew Michael from Bleyl JHS and moved him to Utah at their own expense for approximately four months.

During the time period Michael was enrolled in the Cy-Fair ISD, his placements ranged from fully mainstreamed regular classroom instruction to a self-contained placement in an adaptive behavior classroom.[3] Michael always had access, however, to non-disabled peers. These placements, as well as Michael's educational program, were altered at different intervals in response to Michael's behaviors and learning styles exhibited in the various environments. Eight Admission, Review and Dismissal ("ARD") Committee meetings were held between October of 1992 and November of 1993. (TEA record, Vol. IX, Respondent's Exhibits 2, 4, 5, 6, 8, 9, 50, and 65, respectively). At each of the meetings, school staff, as well as Michael's parents, reviewed his progress and made

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[3]An adaptive behavior class is one which is designed to help students with inappropriate behavior. The student stays in the same classroom for several subjects and a point structure is utilized which enables the student to gain rewards throughout the class period by exhibiting appropriate behavior. *See* TEA record, Vol. VI, pgs. 2482-2484.

recommended changes to his IEP and placement[4] to adjust for his varying behaviors in the Cy-Fair ISD's program.

During this time period, Michael exhibited much of the behavior typical of an adolescent suffering from the disabilities of Tourette's Syndrome, severe depression, bi-polar disorder, and attention deficit hyperactivity disorder. Michael's teachers documented each instance of inappropriate behavior exhibited during his enrollment in Cy-Fair ISD. The Petition completely ignores the actions of Cy-Fair ISD in response to these behaviors and the progress demonstrated by Michael during his time within the Cy-Fair ISD as noted by the district court and again by the Fifth Circuit Court of Appeals.

Michael was privately placed by his parents at PCS in Utah on November 8, 1993. (*See* Transcript of District Court Hearing, p. 259). The district court concluded that the IEP's in effect during Michael's placement at PCS were the ones to be considered in determining whether Michael had available to him a free appropriate public education. The parents have never challenged, through the district court appeal or the appeal to the Fifth Circuit, Cy-Fair ISD's compliance with any procedural requirements of the IDEA. Accordingly, the proper focus of the district court and the Fifth Circuit Court of Appeals was on the IEP's in effect at the time Michael withdrew from Bleyl JHS and while he was in PCS. The district court also analyzed the May 26, 1993 IEP in determining that Michael was benefiting from his educational program. The district

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[4]The term "placement" refers to the type of classroom or educational setting in which instruction takes place. A regular education classroom is the least restrictive environment. A school district is required to provide a continuum of placements moving from least to most restrictive. 20 U.S.C. § 1412(5) and 34 C.F.R. § 300.551-552

court found that Michael was receiving benefit at all relevant times.

The initial IEP for the 1993-1994 school year was developed on May 26, 1993. The ARD committee determined that Michael could be placed in regular education classes for the upcoming school year. The IEP included support services for the regular education classes, such as a discipline contingency plan, a behavioral intervention plan, psychological services, a tracking teacher to monitor his progress, and a handpicked team of teachers who were to receive training to deal with Michael and his disabilities. Additionally, an extra set of textbooks was to be sent to Michael's home for use during the year, and a detailed discipline contingency plan was developed for the teachers to utilize in dealing with Michael's behavior. Michael's parents attended this ARD committee meeting, signed the report, and noted their agreement with the IEP and placement for the 1993-1994 school year. (TEA record, Vol. IX, Respondent's Exhibit 9).

The October 4, 1993 IEP was developed at an ARD committee meeting which was called in response to behavioral difficulties exhibited by Michael. (TEA record, Vol. IX, Respondent's Exhibit 50). By this time, Michael had already received a progress report for the first half of the first six weeks. The district court found that Michael was passing all but one class and received at least "satisfactory" marks in conduct in all but two of his classes. (TEA record, Vol. IX Respondent's Exhibit 52 at 1630). However, the majority of the teachers indicated that Michael was having a problem turning in completed work.

The October IEP developed by Michael's ARD committee was individualized in response to Michael's difficulties which were mainly behavioral problems and completing assignments in his mainstream classes. The

October IEP required that Michael attend adaptive behavior ("AB") classes, rather than mainstream, for three subjects: math, language arts, and Texas history. It was also determined that Michael was eligible for content mastery classes when necessary. Additionally, the discipline contingency plan remained in place with the addition of the option for teachers to send Michael to a discipline management class for the remainder of the class period, as opposed to an emergency removal from class, when his behavior escalated. These modifications were made to the IEP in an effort to accommodate and deal with Michael's behavior problems while continuing to keep him in mainstream classes to the greatest extent possible. (TEA record, Vol. IX, Respondent's Exhibit 50).

This ARD committee meeting was attended by all the key "stakeholders" in Michael's education -- his parents, the chairperson of the special education department at Michael's school, a psychologist from the school district, the educational diagnostician, a counselor, an assistant principal from Michael's school, and Michael's special education teacher from the adaptive behavior class who also served as his tracking teacher. Michael's parents signed the ARD committee report denoting their agreement with the new educational plan and placement. (TEA record, Vol. IX, Respondent's Exhibit 50 at 1627). The IEP was developed and approved by a group of professionals and Michael's parents. Furthermore, implementation of the IEP required that the ARD committee members and the teachers in the school work together in order to accommodate Michael's behavior problems while educating him.

Michael's parents unilaterally removed Michael from the Cy-Fair ISD on November 4, 1993, only a month after the development of the October IEP, and too short a period of time

for Michael to reap the full benefit of the October IEP. Immediately prior to withdrawing from the Cy-Fair ISD's program, however, Michael continued to be able to attend regular lunch and to pass in the hallways between classes without being escorted by school staff. Only one assaultive incident occurred in the lunchroom and the halls in the fall of 1993, the minor offense of taking a bite of someone else's pizza. (TEA record, Vol. V, at pg. 1916). For the first six weeks, Michael received passing grades in all but one class. (TEA record, Vol. IX, Respondent's Exhibit 54 at 1632).

On October 26, 1993, Michael received his progress report for the first half of the second six weeks. The progress report reflects that he was failing all but one of his classes at the time. (TEA record, Vol. IX, Respondent's Exhibit 53 at 1631). However, most of the teachers indicated that assignments were not turned in, which resulted in the low grades. The district court and the Fifth Circuit found that by the time Michael was withdrawn from the Cy-Fair ISD, he was passing four of his classes and was very close to receiving passing grades in two additional classes. (TEA record, Vol. IX, Respondent's Exhibit 54 at 1632). He remained in regular education classes for industrial technology, science, reading, speech, and P.E. During the fall of 1993, his behavior in industrial technology, science, and reading was appropriate at all times until the last few days of his attendance when Michael knew he was going to be sent away to Utah by his parents, and had expressed great concern about leaving. (TEA record, Vol. V, pgs. 1975-1976, 2001-2002; Vol. VI, pgs. 2103-2105). The district court and the Fifth Circuit found that Michael's passing grades, his participation and behavior in his classes, and his ability to pass through the halls from class to class and attend lunch unsupervised were signs of positive benefits from his IEP, both academic and behavioral.

After Michael's withdrawal from the Cy-Fair ISD, his ARD committee met on November 18, 1993, at Michael's parents' request, to review his IEP. The ARD committee determined that the IEP should be modified slightly, but did not agree with Michael's parents' request for the Cy-Fair ISD to pay for his placement at PCS. The ARD committee felt that the Cy-Fair ISD could provide him with a free appropriate public education in a less restrictive environment than PCS. The November IEP modified the October IEP by excluding Michael from suiting-up for his physical education class, providing for the implementation of a social behavior curriculum, and offering the services of the Family School Preservation Team to Michael and his family.

Michael's parents did not agree with the decisions reached at the November ARD committee meeting. The IEP developed at this ARD committee meeting, however, was individualized to address Michael's needs in the least restrictive environment. It was developed and was to be implemented in a collaborative manner by the staff at Michael's school. The district court along with the Fifth Circuit held that the November IEP was similar to the October IEP, which did produce positive benefits. The district court and the Fifth Circuit found that the November IEP was, therefore, reasonably calculated to produce educational benefit for Michael.

REASONS WHY THE PETITION SHOULD BE DENIED

A. The Petition does not Present an Important Question of Federal Law.

The Petitioners' claim that Michael was not receiving educational benefit in Cy-Fair ISD mischaracterizes the evidence and, moreover, provides no compelling basis for this

Court to grant certiorari. The Petitioners are merely requesting another layer of appellate review of the evidence.

Moreover, the decision below presents no issues requiring correction by the Court. The district court and the court of appeals each set forth detailed, specific factual examples of the appropriateness of the educational program offered to Michael by the school district as well as academic and non-academic benefit which he displayed during relevant time periods. This included unrefuted testimony from Michael's regular education teachers that, while he was enrolled in class during the fall of 1993 he was generally on task (TEA record, Vol. VI, at pg. 2097), demonstrated enthusiasm by volunteering for assignments (TEA record, Vol. VI, at pg. 2097), often controlled his own behavior by asking for permission to sit down and putting his head on his desk (TEA record, Vol. VI, at pg. 2098), worked well in small groups (TEA record, Vol. VI, at pg. 2275), and was able to bring his behavior under control after several reminders (TEA record, Vol. VI, at pg. 2350-51).

Michael's special education teacher reported that his ability to respond to him as a teacher improved along with his ability to carry on a mature conversation (TEA record, Vol. VI, at pg. 2415). His teacher also reported that he was improving in his ability to control his urges to interrupt class with inappropriate comments and behavior and was complying with the general focus of the adaptive behavior classes (TEA record, Vol. VI, at pg. 2415-16). Administrative staff as well as Michael's psychologist reported that his appropriate behavior was improving while in the adaptive behavior classroom (TEA record, Vol. V, at pg. 1949-50; Vol. VII, at pg. 2831). All staff who were in direct and frequent contact with Michael reported that he did not pose a danger to students or staff at his school (TEA record, Vol. V, at pg. 1964) (*see also* testimony of Dr.

Bernard Rosenberg, R. 921, pgs. 126-127). This unrefuted testimony demonstrated that Michael was receiving genuine educational benefit in his program, both academically and non-academically, at the time of his removal by his parents.

The state hearing officer's decision concentrated upon the listing of behavioral infractions Michael committed over his entire tenure in school and ignored the significant amount of testimony provided by Michael's regular education teachers, special education teacher, psychologist, and administrators who all testified about the observable progress he made both in and out of classroom areas. The district court noted that it was cognizant of Michael's discipline incidents but held that there was sufficient positive benefits displayed to demonstrate that his program provided him with an appropriate education. The district court gave "due weight" to the hearing officer's findings but also accepted additional evidence at the hearing on September 5, 1995. By a preponderance of *all* of this evidence, the district court properly concluded that the school district had offered Michael a free appropriate public education.

The Fifth Circuit considered the appropriateness of Michael's IEP as a mixed question of fact and law on a de novo basis, reviewed all of the evidence submitted, and came to the same conclusion. The Fifth Circuit also properly reviewed the district court's findings of fact for clear error and concluded that the district court committed no reversible error in determining that Michael's IEP's and his placement within the Cy-Fair ISD were appropriate under the IDEA. The Fifth Circuit made specific mention of the testimony of Michael's regular education teachers, special education teacher, and psychologist as support for the factual findings of the district court, as well as the testimony of Michael's own treating psychiatrist at the time of his diagnosis with Tourette's Syndrome, who testified it would be inappropriate to remove Michael from school when

he was experiencing success in many of his classes. All of this testimony was virtually ignored by the administrative hearing officer. *Compare Hall v. Shawnee Mission School Dist.*, 856 F.Supp. 1521, 1528-29 (D. Kan. 1994) (IEP calling for partial placement in adaptive behavior class was reasonably calculated to produce educational benefit as demonstrated by child's academic achievement on par with his grade level and gradually improving behavior, despite continuing behavior problems at home), and *Swift v. Rapides Parish Public School System*, 812 F.Supp. 666 (W.D. La.), *aff'd*, 12 F.3d 209 (5th Cir. 1993) (same), and *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 132 (5th Cir. 1993) (educational benefit of IEP designed for seventeen-year old boy with various behavior, learning and speech disorders evidenced by testimony of student's teacher and school psychologist, fact that student advanced in terms of grade level, and student's increasing ability to focus on particular tasks).

The Petitioners' seem to argue that any child who exhibits significant behavioral disabilities should automatically be placed outside of the regular classroom in a residential placement. This argument defies the holdings of this Court, the language of the IDEA, and common-sense. The Petitioners cite *Clyde K. v. Puyallup Sch. Dist. No. 3*, 35 F.3d 1396 (9th Cir. 1994); *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884 (9th Cir. 1995); *M.R. v. Lincolnwood Bd. of Educ. Dist. 74*, 843 F.Supp. 1236 (N.D. Ill. 1994); and *Chris D. v. Montgomery County Bd. of Educ.*, 753 F.Supp. 922 (N.D. Ala. 1990) as support for Michael F.'s claim that the Fifth Circuit relied on "form over substance" in determining that reimbursement for residential care was not justified in this case. These cases, however, considered students' individual responses to different educational programs and do not stand for any general rule of law, but, rather, the individual

application of legal principles to a unique set of facts. The Fifth Circuit, citing the "strong factual support for the district court's decision," properly held that such cases were inapplicable and readily distinguishable. *Cypress-Fairbanks ISD v. Michael F.*, 118 F.3d at 256, n. 30.

Finally, the Petitioners' version of the facts simply is not supported by the record. The Petitioners contend that Michael's behavior remained unchanged from the date of his placement in the adaptive behavior classroom for three classes in October, 1993 until his removal to PCS in November, 1993. The Petitioners overlook, however, the fact that Michael exhibited only a single instance of physical aggression towards anyone from the time he entered this class until the time of his removal. (TEA Record, Vol. IX, Respondent's Exhibit 61). They also overlook the fact that he was emergency-removed from school only once for a one-half day period following his adaptive behavior classroom placement (TEA record Vol. IX, Respondent's Exhibit 62); that during all of the Fall of 1993, Michael ate his lunch in the school cafeteria unattended and passed in the hallways from class to class without being escorted by school staff (TEA Record, Vol. VI, pgs. 2098, 2275, 2350-51, 2415-16); and that he was receiving passing grades in most of his academic and non-academic classes at the time of his removal from Cy-Fair ISD (TEA Record, Vol. IX, Respondent's Exhibit 54).

In their Statement of the Case, the Petitioners also directly misstate some aspects of the evidence. The Petitioners focus on Michael's performance in the "hallways" of his junior high school. They infer that such performance was the only indicia of academic and non-academic benefit identified by the Fifth Circuit and the district court. However, the few instances referenced in the Petitioners' brief of Michael's misbehavior are often incorrectly reported or taken out of context. For instance,

on September 29, 1993, Michael did not get into a fight in the hall as the Petitioners have asserted. According to the documentation in the exhibits, Michael was speaking out in the library and was then escorted to the office by a teacher. There was no fight involved at all according to the record. (TEA record, Vol. VIII, Petitioner's Exhibit 115 at 1280.) The Petitioners claim that on October 1, 1993, Michael walked into the class from the hall screaming when in actuality, Michael entered the room, then began to ask where another student was. (TEA record, Vol. VIII, Petitioner's Exhibit 100 at 1245.)

Another mischaracterization is cited by the Petitioners as having occurred on October 22, 1993. First, Petitioners cite to a page of the Record dated October 4, 1993, not October 22, 1993 as Petitioners have alleged. Second, the Petitioners assert that Michael "could not walk alone and had to be escorted by a principle [sic]." Nothing, however, is noted in the record of Petitioner walking to the office or being escorted by a principal on that day. All that was shown was that Michael had *chosen* to go to the office after misbehaving. (TEA record, Vol. VIII, Petitioner's Exhibit 115 at 1283.) On October 27, 1993, the record showed that Michael was engaged in horseplay with another student. Petitioners, however, claimed that Michael "poured a can of lemonade on a teacher's head in the hall," another misstatement of the record. (TEA record, Vol. VIII, Petitioner's Exhibit 115 at 1291.) Finally, there is nothing in the record to indicate that Michael was "cited for destruction of school property in the hallway" on November 3, 1993, as the Petitioners claim. Michael had actually pulled down posters in the hall. Also, he was not "cursing loudly in the hallway." All that was shown in the record on November 3, 1993 was that Michael had called his teacher one name. (TEA record, Vol. VIII, Petitioner's Exhibit 115 at 1298.)

Clearly, the parties still dispute the evidence. Two reviewing courts have combed the voluminous record and have come to the same conclusion based on the evidence. This Court should not expend its resources in a third review of the facts.

B. The Fifth Circuit Decision does not Substantially Conflict with any Prior Decision of this Court or any other Court of Appeals.

The standard of review that a district court must give an administrative hearing officer's decision is set forth by the IDEA itself and prior decisions of this Court. When a federal district court reviews a state hearing officer's decision in an impartial due process hearing under the IDEA, the court must receive the record of the administrative proceedings and is then required to take additional evidence at the request of any party. 20 U.S.C. § 1415(e)(2). In this case, the Fifth Circuit has made note that, while a district court must accord "due weight" to a hearing officer's findings, the court must ultimately reach an independent decision based on a preponderance of the evidence. *See Board of Educ. v. Rowley*, 458 U.S. 176, 205, 102 S.Ct. 3034, 3050 (1982); 20 U.S.C. § 1415(e)(2). The Fifth Circuit has characterized this statutory requirement for review as "akin" to a "trial de novo." *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d at 131.

The Petitioners incorrectly suggest that an independent review by the district court is impermissible under the IDEA as well as this Court's prior holdings. Not only is an independent review called for under the statute and this Court's holding in *Rowley*, the Fifth Circuit's standard of review reflects virtually all circuits' holdings in this area and, in fact, is specifically

adopted by two of the three decisions cited by the Petitioners for evidence of contrary holdings.

The Seventh Circuit recently held that a district court must make an independent determination of whether the requirements of the IDEA have been satisfied. *Board of Educ. of Murphysboro Community Unit Sch. Dist. No. 186 v. Illinois State Bd. of Educ.*, 41 F.3d 1162, 1166 (7th Cir. 1994). The court stated that the determination of whether a school district has provided a free appropriate public education is a "mixed question of law and fact which we review de novo." *Id.*

The court maintained that "Congress specifically rejected language which would have made state administrative findings conclusive if supported by substantial evidence." *Id.* (citing *Board of Educ. v. Rowley*, 458 U.S. 176, 205, 102 S.Ct. 3034, 3050 (1982)). However, the court also recognized that courts do not have special expertise in the area of education and should not substitute their judgment for that of school authorities. *Id.* Therefore, the "due weight" element of *Rowley* was incorporated into the de novo standard of review. *Id.*

Likewise, the Ninth Court of Appeals has adopted the same standard of review as the Fifth Circuit. In *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 891 (9th Cir. 1995), the court held that while the court is to review the administrative findings carefully, the court is free to accept or reject those findings. *Id.* (citing *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307 (9th Cir. 1987); *Town of Burlington v. Department of Educ.*, 736 F.2d 773, 792 (1st Cir. 1984), *aff'd*, 471 U.S. 359, 105 S.Ct. 1996 (1985)).

Other courts of appeals have also identified the same standard of review utilized by district courts in the Fifth Circuit. *See G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 945 (1st Cir. 1991) (holding that the trial court's review is short of complete de novo review but the precise degree of deference

is "left to the discretion of the trial court") (quoting *Town of Burlington v. Department of Educ.*, 736 F.2d 773, 792 (1st Cir. 1984), *aff'd*, 471 U.S. 359, 105 S.Ct. 1996 (1985)); *Doe v. Defendant I*, 898 F.2d 1186, 1190 (6th Cir. 1990) (addressing the issue of whether a student's individualized education plan constituted a free appropriate public education and holding that "de novo" review was the applicable standard); *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 611 (8th Cir. 1997) (making the determination that whether a school district has provided a free appropriate public education is a mixed question of law and fact and the standard of review is de novo); *Doe v. Alabama State Dep't of Educ.*, 915 F.2d 651, 657 n.3 (11th Cir. 1990) (stating that while the court must consider the administrative findings of fact, the court is free to accept or reject them).

These decisions reflect the standard of review mandated by the IDEA as well as this Court in *Board of Educ. v. Rowley*. The parties in *Rowley* disagreed over whether the IDEA's language indicated a "de novo" standard of review or a severely restrictive standard of review. *Rowley*, 458 U.S. at 205, 102 S.Ct. at 3050. This Court explicitly rejected the severely restrictive review, noting that the Senate Conference Committee rejected language in the statute requiring administrative findings to be conclusive and decided instead that the district court must make "independent decisions based on a preponderance of the evidence." *Id.* (citing S. Conf. Rep. No. 94-455, p.50 (1975), U.S. Code Cong. & Admin. News 1975, p.1503). Although this Court relied on the legislative history of the IDEA, it did not grant full authority to the reviewing court. This Court interpreted section 1415(e) to carry an implied requirement that "due weight" must be given to the administrative proceedings. *Rowley*, 458 U.S. at 206, 102 S.Ct. at 3051.

Other courts have interpreted the purpose of the "due weight" requirement as articulated in *Rowley* as a means of keeping the courts from imposing their views of appropriate educational methods on the states. In *Oberti v. Board of Educ.*, 995 F.2d 1204, 1219 (3d Cir. 1993), the Third Circuit held that the "due weight" is owed to the *administrative proceedings*, not to the party who happened to prevail in those proceedings." *Id.* (emphasis in the original.) The amount of deference due to the proceedings is ultimately left to the discretion of the district court. *Id.* The court must consider the administrative findings, but is free to accept or reject them. *Id.* (citing *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853, 857 (11th Cir. 1988).

Only the Fourth Circuit has held that the findings of fact of a hearing officer are entitled to presumptive validity or prima facie correctness. *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991). However, the Fourth Circuit opinion also states that, after giving the administrative findings due weight, the district court is free to decide the case on the preponderance of the evidence as required by the IDEA. *Id.* "If the district court is not going to follow the administrative findings, the court should explain the reason why." *Id.* Thus, although the Fourth Circuit provides for a greater degree of deference to administrative findings than other circuits, a district court in the Fourth Circuit is still given the opportunity to accept or reject those findings. In this case, the results would have been the same whether it had been filed in the Fourth or the Fifth Circuit. The findings of the hearing officer were not rejected by the district court, but, rather, incorporated into the district court's consideration of *all* of the evidence. The district court and the Fifth Circuit did not ignore the reports of Michael's inappropriate behavior but considered them in light of the unrefuted progress reported in the testimony and documents entered into evidence, progress

which the administrative hearing officer completely ignored in his decision.

The statute itself, along with decisions of this Court, have clearly identified a preponderance of the evidence standard of review for cases under the IDEA and have identified the district court's obligation to hear additional evidence. *Town of Burlington*, 471 U.S. 359, 363, 105 S.Ct. 1996, 1999 (1985); *Board of Educ. v. Rowley*, 458 U.S. at 206, 102 S.Ct. at 3051; 20 U.S.C. § 1415(e)(2). The district court weighed all of the evidence which was introduced at the administrative hearing as well as at its own hearing on September 5, 1995 and, by a preponderance of the evidence, determined that Michael had been offered a free appropriate public education.

The Petitioners' contention that a significant conflict in decisions on this issue exists between the circuit courts of appeals is simply incorrect. In all circuits, the final decision of whether a child has been provided an appropriate education is left to the district court to be determined by a preponderance of all the evidence. Because no conflict is presented, review by this Court is unwarranted.

C. The District Court's Award of Costs Other than Attorneys' Fees to the Cy-Fair ISD Was Proper

The Petitioners assert an award of costs pursuant to Rule 54 of the Federal Rules of Civil Procedure violates the IDEA. The Petitioners cite no cases whose holding supports this proposition. The case cited by Petitioners does not address costs granted pursuant to Rule 54. The district court's award of costs to Cy-Fair ISD was proper.

The standard of review in an award of costs is abuse of discretion. *Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 2541

(1988); *Alberti v. Klevenhagen*, 46 F.3d 1347, 1358 (5th Cir. 1995). The district court's award of costs other than attorneys' fees in this matter was not an abuse of discretion. As noted by the district court, and the Fifth Circuit, Fed. R. Civ. P. 54(d)(1) ("Rule 54") provides that "[e]xcept when express provision therefore is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs...." Fed. R. Civ. P. 54(d)(1). While the IDEA expands Rule 54 to allow for reasonable attorneys' fees as a part of the costs to *parents* who prevail, this expansion in no way limits the costs other than attorneys' fees allowable by Rule 54. Pursuant to Rule 54 and the "plain meaning" of the statute, Cy-Fair ISD, as a prevailing party, was entitled to certain costs as a matter of course. Accordingly, Petitioners' argument is without merit.

Petitioners assert that the district court's award of costs to Cy-Fair ISD was unjust. Petitioners assert that the IDEA only intended that costs be awarded to prevailing parties when such parties are parents and children. The IDEA contains no such provision barring an award of costs other than attorneys' fees to a school district. In fact, several courts have awarded costs to prevailing party school districts in actions originally brought under the IDEA and its predecessor, the Education for All Handicapped Children Act ("EHA").

In *Dodds v. Simpson*, 1987 WL 49461 (D. Or. 1987), the parents of a disabled child brought an action under the EHA. The school district prevailed. Accordingly, the court awarded costs to the district, relying on *Northcross v. Board of Educ.*, 611 F.2d 624, 640 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980), and reasoned that under FED. R. CIV. P. 54(d), "the prevailing party in a civil rights action is in the same posture as [a] prevailing party in any other action with regard

to costs . . . . [C]osts are awarded as of course to the prevailing party." *Dodds*, page 2. Under *Dodds* and Rule 54, the Cy-Fair ISD was entitled to costs "as a matter of course." Hence, the district court and the Fifth Circuit did not abuse their discretion by allowing Cy-Fair ISD certain costs other than attorneys' fees.

In awarding costs under the IDEA, the district court in *P.L. v. Norwalk Board of Educ.*, 22 IDELR 1119 (D.C. Conn. 1995), discussed the IDEA's legislative history. The court averred that § 1415(e)(4)(B) of the IDEA "clearly shows that Congress intended to permit cost and fee awards . . . . " *Id.* at 1120. Other than the prerequisite that costs may only be awarded to prevailing parties, neither *P.L.*, Rule 54, nor the legislative history of the IDEA suggests that costs other than attorneys' fees may be awarded *only* to parents and children who are prevailing parties. *See also Buser v. Corpus Christi ISD*, 20 IDELR 981, *aff'd* 51 F.3d 490 (5th Cir. 1995), *cert. denied* 116 S.Ct. 305 (1995) (costs awarded to school district in IDEA action, upheld on appeal); *Bonnie F. v. Calallen ISD*, 835 F.Supp. 340, 351-52 (S.D. Tex. 1993), *aff'd* 40 F.3d 386 (5th Cir. 1994), *cert. denied* 115 S.Ct. 1796 (1995) (costs and attorneys' fees awarded to school district in IDEA action, upheld on appeal); *Teague ISD v. Todd L.*, Civ. No. W-91-CA-276 (W.D. Tex. 1992), *aff'd*, 999 F.2d 127 (5th Cir. 1993) (costs awarded to school district, upheld on appeal).

In arguing that the legislative history of the IDEA and the EHA precludes an award of costs to a school district, Petitioners urge that only "parents or legal representatives," as prevailing parties, are entitled to costs. Petitioners go on to state that Federal Rule of Civil Procedure 54 itself is in conflict with the IDEA and must be disregarded in any case brought under the Act. However, the IDEA places no restriction upon the application of Rule 54.

Petitioners also cite *Jenkins v. Squillacote*, 935 F.2d 303 (D.C. Cir. 1991), in support of their argument that the district court's award of costs was improper. In *Jenkins*, the parents of a disabled child brought suit under the IDEA challenging the child's placement. At an administrative hearing, the school district's notice regarding the child's placement was found to be deficient. Subsequently, another hearing examiner ordered that the school district pay for the child to be placed in a private placement for the upcoming school year. The school district appealed. The district court overturned the hearing officer's decision and the school district sought reimbursement for the private placement tuition costs it had paid to the parent pursuant to the hearing officer's order. *In dicta*, the court noted that "[i]t would be absurd to imagine a trial court ordering parents to reimburse a school system for the costs of a *hearing examiner's* erroneous placement of their child . . ." *Id.* at 307 (emphasis added). The *Jenkins* dicta discusses whether a school district that is successful in an appeal can recoup as reimbursement the money it paid for tuition expenses for a parents' placement of a child in a private program, not costs awarded pursuant to Rule 54. The hearing officer upheld the placement and was later overturned by a district court. *Jenkins* is clearly distinguishable from the case at hand. Neither in *Jenkins*, nor the cases cited therein, does any party seek *costs pursuant to Rule 54*. Accordingly, the court's dicta in *Jenkins* is totally inapplicable to this case.

Petitioners finally contend that "[t]he statute specifically limits awarding school districts or the state to situations where the parents brought a suit that was frivolous, unreasonable or without foundation." Under Rule 54, costs other than attorneys' fees may be allowed as a matter of course to the prevailing party unless the court otherwise directs. Nothing in the language of Rule 54 nor the IDEA nor its legislative history

requires that a parent or child bring a frivolous suit in order for a district court to appropriately award costs other than attorneys' fees to a school district. The legislative history cited by the Petitioners states that a prevailing school district's *attorneys' fees* may be taxed against a parent who brings a suit which is "frivolous, unreasonable or without foundation." The legislative history cited by the Petitioners, however, contains no restrictions regarding the normal application of Rule 54. *See* 4 U.S. Code Cong. & Admin. News 1798-1810 (1986); *see also* 2 U.S. Code Cong. & Admin. News 1425-1508 (1975).

CONCLUSION

This is not a case involving questions of constitutional magnitude or the interpretation of a school district's legal responsibilities under the IDEA. First and foremost, this case is a fact-intensive dispute in which the Petitioners now seek a third review of the evidence.

Neither does the case represent a split in decisions among the courts of appeals regarding the treatment of the administrative hearing decision by a district court. Although the specific terminology used by the courts of appeals may differ, all recognize that the IDEA itself sets the standard for review by requiring an independent decision by the district court based on a preponderance of the evidence.

The award of costs to the school district by the district court and the Fifth Circuit Court of Appeals is not an abuse of discretion. It is specifically allowed by Rule 54 and not barred by the IDEA or its legislative history.

The scarce judicial resources of this Court should not be used on this case which is, at its heart, a dispute over the interpretation of evidence. For all of the foregoing reasons, the petition for writ of certiorari should be denied.

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Respectfully submitted,

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